



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**SUCCESSION CAUSE NO. 812 OF 2013**  
**IN THE MATTER OF THE ESTATE OF JOHN MASHETI OMUNYOKHO (DECEASED)**

**JUDGMENT**

1. The deceased herein died on 28<sup>th</sup> July 2006. The Assistant Chief of Sitari Sub-Location identified the persons entitled to a share in the estate as a son of the deceased, known as Aggrey Mukolwe Masheti, a brother of the deceased known as Harrison Chituyi Omunyokho, and two individuals whose relationship with the deceased is not disclosed, that is to say David Nangabo Omunyokho and Ezekiel Siro Omunyokho.
2. Representation to the estate was sought by Aggrey Mukolwe and Harrison Chituyi, in their alleged capacities as sons of the deceased. The survivors listed in the petition were three sons, three brothers and three daughters. The sons were listed as Aggrey Mukolwe Masheti, Nichodemus Masheti and Jackson Wande. The daughters are said to be Peris Atsulu, Beatrice Nasenya and Eseri Shisoka. The brothers are listed as Harrison Chituyi Omunyokho, David Nangabo Omunyokho and Ezekiel Siro Omunyokho. He was said to have had died possessed of a property known as Marama/Lunza/1830. Letters of administration intestate were made to the two petitioners on 2<sup>nd</sup> January 2014, and a grant was issued, dated 28<sup>th</sup> April 2014. I shall refer to the two hereafter as the administrators,
3. An affidavit of protest was lodged at the registry, rather prematurely, by Wycliffe Ongále Makokha, on 20<sup>th</sup> January 2015, sworn on 20<sup>th</sup> January 2014. Prematurely because as at the date the same was sworn and filed, the administrators were yet to file a summons for confirmation of their grant. His case is that he had bought 10 acres out of Marama/Lunza/1830 in 1972, and he took possession, despite the property still being in the name of the deceased. He sued the deceased in Kakamega HCCC No. 347 of 1988 to recover the 10 acres, and the court ruled in his favour. The deceased died before he could transfer the 10 acres to him, which forced him to cite Aggrey Mukolwe Masheti and Nichodemus Omunyokho Masheti to take out representation so as to enable him to get his 10 acres. He appears to be miffed that the administrators did not list him as a creditor in their petition.
4. The administrators filed two summonses for confirmation of grant, one is dated 8<sup>th</sup> September 2015 and the other 1<sup>st</sup> July 2016. The latter application was filed without the first application being withdrawn first. I shall take it that the latest application overrides the earlier application and it is the second application, dated 1<sup>st</sup> July 2016 that I shall consider for determination.
5. The application, dated 1<sup>st</sup> July 2016, is at the instance of both administrators. They aver that the deceased was survived by a son and three brothers, that is to say Aggrey Mukolwe Masheti, Harrison Chituyi Omunyokho, David Nangabo Omunyokho and Ezekiel Siro Omunyokho. The persons who are identified as beneficially entitled to Marama/Lunza/1830 are listed as Aggrey Mukolwe Masheti,

Harrison Chituyi Omunyokho, David Nangabo Omunyokho, Ezekiel Siro Omunyokho, Mukwana Moses Alutalala, Joyce Imbuye Shimonyi, Tom Joshua Akoto, Joseph Wandera, Ezekiel Anekeya and Wycliffe Ongále Makokha. Mukwana Moses Alutalala, Joyce Imbuye Shimonyi, Tom Joshua Akoto, Joseph Wandera, Ezekiel Anekeya and Wycliffe Ongále Makokha are listed as purchasers. Their respective shares are listed. There are also consents in Form 17, listing Aggrey Mukolwe Masheti, Harrison Chituyi Omunyokho, David Nangabo Omunyokho, Ezekiel Siro Omunyokho, Mukwana Moses Alutalala, Joyce Imbuye Shimonyi, Tom Joshua Akoto, Joseph Wandera, Ezekiel Anekeya and Wycliffe Ongále Makokha against the shares allocated to them, and they have all signed the consent form, except for Wycliffe O. Makokha.

6. Wycliffe Ongále Makokha responded to the application by filing the affidavit of protest, that I have referred above, again on 27<sup>th</sup> March 2017, purporting it to have been sworn on 23<sup>rd</sup> March 2017, attaching the same annexures, the decree in Kakamega HCCC No. 347 of 1988 and the citation that was issued against Aggrey Mukolwe Masheti and Nichodemus Omunyokho Masheti. I shall refer to him as the protestor.

7. Directions were given on 25<sup>th</sup> May 2017, for the disposal of the confirmation application by *viva voce* evidence.

8. The oral hearing happened on 1<sup>st</sup> July 2019. The protestor, Makokha Wycliffe Ongále, national identity card number 6323035, was the first to testify. He stated that he had a decree against the estate with respect to the 10 acres that he had bought from the deceased. He stated that the decree was passed in 2005, and an appeal had never been filed against it. He stated that his claim was for the 10 acres. He stated that his claim arose from his dealings with Nichodemus, the owner of the property. During cross-examination, he stated that he bought the property in 1972. He said he was 20 years old then. He stated that his own mother, Syphrose Omuseve, had also bought a portion of the property from Nichodemus. He also stated that he had two other cases over the property, being Kakamega HCCC No. 147 of 1987 and Citation No. 139 of 2013. He said in HCSC No. 147 of 1987, the grant was confirmed without involving him, and his name was left out, so he sued, in Kakamega HCCC No. 347 of 1988, after being advised to do so by the court. He said that he sued the deceased herein, John Masheti as administrator of the estate of Nichodemus, who was his father. He said that he occupied 5 acres on Marama/Lunza/1830.

9. One of the administrators testified next, Harrison Chituyi Omunyokho. He stated that he was a son of Nichodemus Omunyokho, and the deceased person, the subject of these proceedings, John Masheti, was his elder brother. He stated that the protestor was not entitled to the land, arguing that he never bought land from Nichodemus, instead it was the protestor's mother, Syphrose Omuseve, who got land from Nichodemus, through purchase. He asserted that the protestor was entitled, only, to the portion that was due to his mother, which was only 3 acres. He stated that a HCSC No. 147 of 1987 was a cause to the estate of their late father Nichodemus, and the deceased person herein, John Masheti, was the administrator. He stated that in that cause the protestor was involved, Tanui J held that the protestor was not a son of the deceased, and what he needed to do was to sue to get his share. He stated that the proceedings in Kakamega HCSC No. 147 of 1987 went up to confirmation, but the estate was not distributed.

10. During cross-examination, the administrator confirmed that the deceased herein was his brother, who had been registered as proprietor of Marama/Lunza/1830 as administrator. He conceded that he was aware that the protestor had sued the deceased over 10 acres, but he did not know the outcome of those proceedings. He stated that as brothers they were entitled to get their share, and then the protestor can pursue whoever sold him the land. He stated that he was willing to give to the protestor 3 acres, which was the portion that his mother had bought from their father, Nichodemus. He stated that he had since changed his mind and revised the offer to 1 acre. He stated that the protestor had not come to buy the land, but had only accompanied his mother. He stated that the persons entitled to Marama/Lunza/1830 were himself and his brothers, David and Ezekiel and the children of John. He stated that there were other claimants, such as Simon Mbwabi, Joseph Wandera, Moses Anangwe, Tom Akolo, Anekeya Ezekiel, Moses Alutalala Mukhwana, and others. He stated that those persons were not heirs, but persons who had acquired property from the heirs. He stated that they were not allocating anything to the protestor because

what remained, after they sold the land to others, was less than 10 acres, and if they gave him the 10 acres, then the rest would have nothing to share. He stated that the mother bought the land in 1972, and the protestor moved in in 1995.

11. At the close of the oral hearing the parties agreed by consent to have the proceedings in Kakamega HCSC No. 147 of 1987 admitted as an exhibit, and to file written submissions. The only written summons on record were filed by the protestor.

12. Let me start by saying that the proceedings that were conducted herein were needless. What the parties are doing is to have the property in question, Marama/Lunza/1830, distributed concurrently in two succession causes. It is the subject of Kakamega HCSC No. 147 of 1987, in the cause of the its owner, Nichodemus Omunyokho. That matter went up to confirmation, and the property was distributed in orders that were made on 18<sup>th</sup> July 1995. There is on record a certificate of confirmation of grant issued by the court in that respect, dated 18<sup>th</sup> July 1996. The same property, Marama/Lunza/1830, is the subject of the instant cause, in the estate of John Masheti, the administrator of the estate of Nichodemus Omunyokho, in Kakamega HCSC No. 147 of 1987. The application that I am being called upon is to distribute the same property, Marama/Lunza/1830, in this cause. That would be the second time that the property is being subjected to distribution. It has already been distributed in Kakamega HCSC No. 147 of 1987, and, surely, it cannot be available for distribution in this cause.

13. It must be stated that one single asset cannot be available for distribution in two separate succession causes relating to estates of two different individuals. The parties herein have, no doubt, gotten themselves mixed up. The mix-up appears to have arisen from the fact that when the deceased in this cause, John Masheti, was granted representation to the estate of the deceased in Kakamega HCSC No. 147 of 1987, he caused himself to be registered as proprietor of Marama/Lunza/1830 on 17<sup>th</sup> May 1988. That was permissible under the provisions of the Registered Land Act, Cap, 300, Laws of Kenya, now repealed. However, that did not make him the absolute owner of Marama/Lunza/1830, since the grant had not been confirmed yet, and it was not confirmed until 18<sup>th</sup> July 1996. That meant that his registration on 17<sup>th</sup> May 1988 was as administrator of the estate of the deceased in Kakamega HCSC No. 147 of 1987, which meant that he held the property in trust for the said estate. The property did not become his absolutely, for he only held it as a trustee for the benefit of the estate. When he died, Marama/Lunza/1830 did not form part of his estate, for it never was his property. The property of an estate that vests in an administrator by virtue of section 79 of the Law of Succession Act, Cap 160, Laws of Kenya, never forms part of his estate. He merely holds it as trustee for the estate of the other in respect of which he is administrator. Marama/Lunza/1830 is, therefore, not available for distribution in this cause as property of John Masheti, it was never his. It is for distribution in Kakamega HCSC No. 147 of 1987, as the property of Nichodemus Omunyokho. What should be distributed in the instant cause, as the property of John Masheti, is what the said John Masheti, is entitled to out of Kakamega HCSC No. 147 of 1987, from the estate of Nichodemus Omunyokho.

14. What the parties should have done in this matter, after the administrator in Kakamega HCSC No. 147 of 1987, John Masheti passed on, was to have him substituted in Kakamega HCSC No. 147 of 1987, and thereafter to have the certificate of confirmation of grant dated 18<sup>th</sup> July 1996 lodged at the relevant lands office for transmission as provided for under the Registered Land Act, before it was repealed, or under the legislation that has replaced it, the Land Registration Act, No. 3 of 2012, and the Land Act, No. 6 of 2012. It is only after transmission has happened that the share of Marama/Lunza/1830, allocated to John Masheti, in Kakamega HCSC No. 147 of 1987 could be subjected to succession proceedings in this cause.

15. From what I have read from the papers filed herein and the oral testimonies, the protestor herein claims to have had bought 10 acres of Marama/Lunza/1830 from the deceased in Kakamega HCSC No. 147 of 1987, Nichodemus Omunyokho, and not from the deceased herein, John Masheti. He has joined these proceedings merely because he had sued John Masheti, as administrator of the estate of Nichodemus, in HCCC No. 347 of 1988, to recover the 10 acres he had allegedly bought from Nichodemus Omunyokho. Clearly, his claim should be in Kakamega HCSC No. 147 of 1987, against the estate of Nichodemus Omunyokho, and not in this cause. He did not buy any property from John Masheti,

and he has no claim whatsoever against the estate of John Masheti,

16. The brothers of the John Masheti, that is to say Harrison Chituyi Omunyokho, David Nangabo Omunyokho and Ezekiel Siro Omunyokho, have no claim at all to his estate. Their claim or interest is in Kakamega HCSC No. 147 of 1987, in the estate of their father, Nichodemus Omunyokho. The rightful heirs to the estate herein, of John Masheti, should be his children, that is to say Aggrey Mukolwe Masheti, Nichodemus Masheti, Jackson Wande, Peris Atsulu, Beatrice Nasenya and Eseri Shisoka. I note, from the confirmation application, that the rightful heirs of John Masheti were sidelined, and instead strangers were listed as beneficiaries.

17. I was told that the bulk of the persons listed in the confirmation application as inheritors were in fact buyers of portions of the land from the children of Nichodemus Omunyokho. Such persons cannot possibly be entitled to play any role in these proceedings. They should not look up to the estate herein, but to those persons who sold land to them. Those who sold to them should cause their shares in Marama/Lunza/1830 transmitted to them as explained above, after which they should have the property transferred to the buyers. Only persons who allege to have bought land from John Masheti, can be considered to be creditors of his estate, and even then such persons should move the Environment and Land Court to prove their claims there, for the High Court has no jurisdiction to determine questions of that nature.

18. Lastly, I will say that the confirmation application before me is premature. Let the parties finalize distribution of the estate of Nichodemus Omunyokho in Kakamega HCSC No. 147 of 1987, and it is only after John Masheti's share has been registered in his name can a confirmation application be mounted in this cause to distribute his property. For now, he has no property to be distributed in this cause through the application dated 1<sup>st</sup> July 2016.

19. In view of everything that I have said above, there is nothing to determine in the application dated 1<sup>st</sup> July 2016. I believe that I have said enough. The orders that I am inclined to make at this stage on the application, dated 1<sup>st</sup> July 2016, are as follows:

- (a) That I find that there is nothing to determine in the said application, as the same is misconceived, incompetent, bad in law and an abuse of court process;**
- (b) That the said application is hereby struck out;**
- (c) That each party shall bear their costs; and**
- (d) That any party aggrieved by the orders that I have made herein is at liberty to move the Court of Appeal appropriately, within twenty-eight days.**

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 8<sup>TH</sup> DAY OF MAY, 2020**

**W. MUSYOKA**

**JUDGE**